In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANT,
v.
M. R. PENDELL AND JESUS ESCOBAR. } No. 211.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

SANTA TERESA GRANT IN NEW MEXICO.

STATEMENT.

On March 2, 1893, M. R. Pendell and Jesus Escobar filed their petition in the Court of Private Land Claims for the confirmation of what is known as the Santa Teresa land grant, situate in the county of Donna Ana, Territory of New Mexico, and alleged in the petition to contain 4 square leagues, measuring 1 league from east to west and 4 leagues from north to south (R., 1–3). The recitals of the petition are to the following effect, and upon them, so far as sustained by the evidence, the plaintiffs claim a confirmation of the grant:

The petition alleges that prior to the year 1790 a tract of land known as the Santa Teresa was granted

to Francisco Garcia by the Spanish authorities of what was then New Biscay and now the State of Chihuahua, in Mexico, and that said grantee thereupon entered upon and took possession of said tract, and he and his heirs and assigns maintained such possession peaceably up to and after the celebration of the treaty of December 2, 1853, commonly known as the Gadsden treaty.

It is further alleged that in the year 1846, while the original documents of title were in the possession of one of the heirs of said Francisco Garcia, the town of El Paso del Norte, in the State of Chihuahua, where said heir resided, was occupied by the military forces of the United States, and the said original documents of title and the official registry, where the same were recorded, were destroyed by said forces; and in order to perpetuate the evidence of title to said grant Jose Maria Garcia, one of the heirs of said original grantee, on January 7, 1853, made application to the said judicial authorities at El Paso del Norte, in accordance with the laws and customs of the Mexican Republic, and asked for a revalidation of the said title, and on January 16, 1853, said judicial authorities reestablished the boundaries and monuments of said grant and placed the heirs in formal legal possession of the same (R., 1).

It is further alleged that a certified copy of said proceedings are on file in the office of the surveyor-general for the Territory of New Mexico, and that Exhibit A, accompanying the petition, is a true copy thereof.

The petition further alleges that the boundaries of

the tract, as set forth in the act of possession made on January 16, 1858, are as follows:

> Being at the bend of the Piedras paradas, there was measured a cordel of fifty varas of the commercial vara, and was shown as the old boundary by the party interested and the practical Alejo Martinez, a thick cottonwood on the margin of the river, from which has been cut purposely solid parts of the bark from around it; and from this point proceeding above from south to north, there was measured four hundred (400) cordels of fifty varas, bounded on the east side by the Rio Bravo, the measure reaching to a cottonwood standing on the bank of the river near some sand hills, with three or four palmetto plants which are found in the bend of the Cobreña, which cottonwood was marked as a boundary by taking from it the bark until penetrating to the center of the wood. From this point the measurement turned from east to west on the north side, and there was measured one hundred (100) cordels of fifty varas, which reached above the brow (ceja) to a small forest of ojasin, at which point was placed as a landmark a pile of stone; turning the measure from north to south on the west side, there was measured four hundred (400) cordels, over the hills and near the brow (ceja), and they reached to a depression of the hills and the brow (ceja), where there was placed as a landmark a mound of earth; turning the measurement from west to east in the direction of the river, there was measured one hundred

(100) cordels of fifty varas, encountering the thick cottonwood which remained marked as the first landmark.

It is further alleged that a preliminary survey of the claim was made under the direction of the General Land Office in 1883, showing an area of 9,681.29 acres, which survey petitioners protest is not in accordance with the boundaries set forth in said act of possession; and the petition further sets forth that the grant had been considered and acted upon by the surveyor-general of New Mexico and recommended by him for confirmation by the United States as reported No. 111, but that no further action had been taken thereon in regard to said grant, either by Congress or by any other authority constituted by law for the adjustment of land titles in the Territory of New Mexico.

The petition concludes with the formal allegations bringing the case within the provisions of the act creating the Court of Private Land Claims and alleging that there is no person in possession of said land claiming the same adversely to petitioners or otherwise than by their lease or permission (R., 3). Plaintiffs finally, in their petition, pray that the validity of their grant may be inquired into and decided and that said tract, with the boundaries just set forth, be confirmed to the petitioners, the heirs and legal representatives of the original grantee, forever.

On December 29, 1896 (R., 19), the United States filed its answer denying each and all of the allegations of the petition and praying that a decree be entered rejecting the claim and dismissing the petition.

On February 23, 1897 (R., 20), Noyes Rand, James H. White, and others, claiming a portion of the premises adversely to the plaintiffs, entered their appearance as defendants in the case, joining with the Government in resisting a confirmation of the grant.

The case came on for formal hearing before the court on October 5, 1898 (R., 98), and finally on August 29, 1899 (R., 20), and upon this hearing plaintiffs introduced their muniments of title (R., 98, 21), appearing on the record as plaintiffs' Exhibit A (R., 3, 17). This document is authenticated as a correct copy of the original in the office of the second judge of the first instance at Paso del Norte by the deposition of certain witnesses taken under the direction of the surveyor-general of New Mexico by Solomon Schutz, commercial agent of the United States at Paso del Norte, Mexico, on November 23, 1878 (R., 116–119), and also by the testimony of Sostenes Rodriguez, second judicial judge at Paso del Norte, now Juarez, Mexico, and thus the legal custodian of the original of this document (R., 68–69). The correctness of the copy is also attested by the testimony of Solomon C. Schutz (R., 69–70), who testified that he had compared the same carefully with the original and that it is a true and correct copy of the same.

In view of this testimony it was assumed by the court below that the document presented was a correct copy of the original in the custody of the second judge of the first instance, or second judicial judge at the city of Juarez, and it now remains to be seen what is the purport and legal effect of that proceeding.

From this document it appears that one Jose Maria Garcia, residing at the then town of El Paso del Norte, on January 7, 1853, presented to the second judge of the first instance of said town a petition, alleging himself to be the testamentary executor under the will of his deceased mother, Josefa Horcasitas de Garcia, the widow of Francisco Garcia (R., 10). He alleges that among the property of that estate was a ranch called Santa Teresa, up the river from Paso del Norte, the document for which he had lost when the American forces took possession of the town, and he prays that in order to supply in some manner the lack of the original document there be taken the testimony of certain respectable persons existing in said town who saw that these documents were the titles to the 4 *sitios de ganado mayor*, which, prior to the year 1790, were possessed by his father, and thereafter occupied by his family until the Indians caused them to leave said premises. The petitioner asks, in view of the fact that there are still existing some servants who worked for his family on said ranch, it being notorious that said ranch had been recognized for many years as the legal property of his parents, that the testimony of Don Francisco Rascon, Don Guadalupe Miranda, Don Jose Maria Maese, Alejo Martinez, Jose Abalos, and Julian Alday be taken in response to five interrogatories set forth in his petition (R., 10–11); and that this judicial inquiry having been concluded, and the establishment of the original boundaries having resulted therefrom, that the judge might give petitioner the possession by law corresponding to him, in

the name of the Garcia heirs, said possession to serve said heirs as their title and security (R., 11).

On January 9, 1853, this petition and the will of petitioner's mother having been considered by Ventura Lopez, second judge of the first instance, that official gave his direction that the witnesses named be cited to appear on January 11, 1853, at which time "decision would be rendered in accordance with the facts." (R., 11.)

On the date named (R., 12) there appeared before Ventura Lopez, the judge just named, the witness, Francisco Rascon, who testified that he was over 60 years of age, had lived in the town of El Paso del Norte since 1813, and from that year he had known the ranch of Francisco Garcia, called Santa Teresa, because he had been there several times before it was abandoned on account of the incursions of the Indians, and that when he came to said town he heard trustworthy persons say that said Santa Teresa ranch was an old property of Francisco Garcia, that he indeed sometimes saw said Francisco Garcia on said ranch with his servants and herds. He further deposed to having had in his hands many times the "possession and original documents of the Santa Teresa ranch authenticated by one of the lieutenant-governors that governed in this district about the close of the last century," and that by reason of his father having been an employee in said town shortly after 1821, he saw the possession of said ranch on file in the archives of his father's office. Witness does not state what office his father held or what was the character of his employment.

He further deposed that although he did not remember the date, he could affirm that said possession was for from 3 to 5 leagues and that said documents were lost when the Americans took possession of said town and occupied the house of Jose Maria Garcia (R., 12).

These proceedings likewise contain the testimony of Guadalupe Miranda to the effect that at that date he was 40 years of age, and that it had been notorious in said town that for some years the deceased, Francisco Garcia, and his children possessed and occupied, with their herds, the Santa Teresa ranch (R., 12); that he had been informed by trustworthy persons that they had seen "some documents of such possession," and that it was a notorious fact that at the time of the occupation of the town by the American forces said forces took a part of the public archives, and that they also occupied Jose Maria Garcia's house, taking therefrom some documents relating to his property and papers of importance, "among them it is assured was the document of said ranch," which said ranch, according to witness's recollection, as he was informed, comprises 4 leagues (R., 12–14).

Jose Maria Maese, likewise called as a witness in this proceeding (R., 13), testified to his being over 40 years of age, and to the fact that he had been at the Santa Teresa ranch several times, and that it belonged to Francisco Garcia, and that when he was very young he had heard it said by respectable old persons that the said Francisco Garcia had had his stock on the said ranch since about the latter part of the last century. He further deposed to having seen "the title

papers to the Santa Teresa given by a lieutenant-governor of this town in the time of the Spanish rule," and that while witness did not remember the date of said document, he was certain that it comprised the donation of 4 leagues; that it is notorious that the American forces and also the Mexican abstracted a part of the archives of this town in the years 1847 and 1848, and also that the Americans occupied the house of Jose Maria Garcia, from whom they took some important papers, and that witness knew from credible persons that in said years the Messrs. Garcia lost the documents they had relating to Santa Teresa.

Witness Alejo Martinez, similarly interrogated (R., 13–14), testified to his being 60 years of age and a native of El Paso del Norte, and to having served for more than twenty years in the family of the Messrs. Garcia in different capacities, for which reason he was for some years prior to 1820 on the Santa Teresa ranch, where the Messrs. Garcia had their herds of horses and large and small stock. Witness further testified as to his knowledge of the several adobe buildings of the principal house of the ranch of Santa Teresa, the corrals and shanties built of poles for the servants; and that it was well known and notorious that the boundaries were as follows: One in the lower bend of the Piedras Paradas; on the lower side, the river; on the north side the boundary crossed the Cobreña bend, and on the side of the plain, the ridge (ceja); and that the ruins of the houses and corrals were still plainly to be seen and could be pointed out by witness, as could also the boundaries formerly recognized (R., 14).

Witness Jose Abalos, interrogated in the same proceeding (R., 14–15), deposed that he was 60 years of age and had served for more than ten years the family of the Messrs. Garcia in different capacities, and had, by reason of that fact, lived for some years prior to 1820 at the Santa Teresa ranch, where the Messrs. Garcia had their herds of horses and large and small stock, of which deponent was shepherd. Witness testified that he knew the several adobe buildings, corrals, and shanties on the Santa Teresa ranch, and that the ruins of the same were still clearly to be seen and could be pointed out by witness; and that he also knew and could point out the boundaries of the Santa Teresa ranch, which witness gave as being the same mentioned by the witness Alejo Martinez.

Julian Alday, similarly examined, gave his age to be 56 years, and testified that he had served for more than twenty years in the family of the Messrs. Garcia in different capacities, and for that reason had served on the Santa Teresa ranch, where the family of the Messrs. Garcia had their herds of horses and large and small stock. Witness testified that he knew and could point out the several adobe buildings and shanties of the Santa Teresa ranch, and also the well-known and notorious boundaries thereof, said boundaries being described by witness in the same terms as by Martinez and Abalos, the two witnesses just quoted from (R., 15).

Thereupon, Ventura Lopez, the judge just referred to, made a finding in favor of Garcia in the following language (R., 15–16).

> In view of the foregoing judicial inquiry with which the executor, Jose Maria Garcia, has proved legally the possession that for many years they have had of the ranch called Santa Teresa, above the dam of the town and the Muleros bend, and it appearing that they have even had titles to said property and these have been lost, and from what appears from the testament and judicial inquiry there is given to the executor Jose Maria Garcia, for himself and in the name of the coheirs, without prejudice to any third party proving a better right, the real, actual, personal, corporal possession, or that which better corresponds in law, by reason of immemorial possession, of the Santa Teresa ranch, with the enjoyment and benefits of the lands, woods, and pastures, and all other products to be found on said premises, and it is ordered that he be protected and defended therein, warning all not to interrupt or molest him in said possession and free use that he may deem fit to make thereof, wit out he being first heard and judgment rendered against him in court after a trial.

In the same order the judge provided that said Jose Maria Garcia should, on the 16th day of the current month, accompany him to the tract designated, with witnesses, taking with him one or two persons to point out the boundaries (R., 16).

On January 16, 1853, Ventura Lopez, describing himself "second judge of first instance of this canton

of Bravos," recites that, accompanied by the assisting witnesses and instrumental witnesses named, and in compliance with the decree just quoted, he repaired to the premises, there being also present Jose Maria Garcia and the old servant, Alejo Martinez, at which time the following is recited to have taken place (R., 16–17):

> Being at the bend of the Piedras Paradas, there was measured a cordel of 50 varas of the commercial vara, and there was shown as the old boundary by the party in interest and the guide, Alejo Martinez, a large cottonwood on the margin of the river from which there had been cut, purposely, some parts of the bark from around it, and from this point, going upward, from south to north, there were measured 400 cordels of 50 varas, bounded on the east side by the Rio Bravo, the measure reaching to a cottonwood standing on the river bank near some sand hills with three or four palmetto plants which were found in the bend of the Cobreña, which cottonwood was marked for a boundary by taking from it the bark and cutting to the center of the wood. From this point the measurement was turned from east to west on the north side, and there were measured 100 cordels of 50 varas, which reached beyond the brow (ceja) to a small growth of ojasen (senna bushes?), at which point was placed as a landmark a pile of stones. Turning the measurement from north to south on the west side, there were measured 400 cordels over the hills and near the brow (ceja), reaching a hollow in the hills and

brow, at which place a mound of earth was made for a landmark; and turning the measurement from west to east, in the direction of the river, there were measured 100 cordels of 50 varas, reaching the large cottonwood which was marked for the first landmark. And in testimony of true possession I led the executor, Don Jose Maria Garcia, by the right hand upon the 4 leagues which are contained within the measurement executed, and within the old boundaries which were pointed out to me. I led him over them and I directed him to make those who were in the said premises leave them; and in this possession I ordered that he and his coheirs and successors be protected and defended so long as judgment be not rendered against them by a court after a trial; and ordering that there be imposed upon those who may interrupt him in this possession the penalties of the law, with which proceeding this measurement was ended, there resulting therefrom the configuration of the land as is shown by the map attached to this possession. I also directed that there be given to the party in interest such copies of these proceedings as he may solicit, placing in the archives of my office the originals, signing this judicial possession with my assisting witnesses, Francisco Barron and Feliz Lerma, the instrumental witnesses, Pedro Trujillo, Jose Beanes, and Jacobo Ugarte, and the guide, Alejo Martinez, all present and residents of this town, on this common paper for lack of the corresponding stamped paper, which will be supplied by the party in interest when it can be had.

At the foot of the document just quoted is the following certificate, signed by Ventura Lopez and attested by Francisco Barron and Feliz Lerma:

> A true copy taken from the originals on file in this office on four leaves of common paper, which will be replaced by the party in interest; it agrees exactly with that from which it was taken four days after the execution thereof, in this town of El Paso del Norte. I certify.

The witness to this certificate, Feliz Lerma, on November 23, 1878 (R., 116), testified to the genuineness of his signature on this certificate and to the correctness of said copy and to the fact that he was present at the taking of the testimony of the witnesses mentioned in said proceeding, their testimony being taken down by him, and that they swore to the same facts mentioned in said proceeding exactly as expressed in the same, and that to his certain and personal knowledge the said order of the said justice was given to the act of possession as stated and set forth in said document, and that the signature of Ventura Lopez to said document is genuine.

Francisco Barron, the other witness to the certificate, also testified, on November 23, 1878 (R., 116), to the genuineness of his signature and that of Ventura Lopez and Feliz Lerma on the copy just referred to, and also to the fact that the evidence set out in said proceedings was taken by Ventura Lopez in his presence, as stated in said document, and that the decree and act of possession therein set forth were given and made as therein stated (R., 117).

It is to be noted at this point that the proceeding of 1853 was, as shown by the certified copy presented, as well as by the testimony of these witnesses who were present at the said proceeding, entirely an ex parte one, there being present no one on behalf of the Government of Mexico or on behalf of anyone except the claimants of the property. The Government accordingly objected to the introduction of this proceeding on the ground that it was improper, immaterial, irrelevant, and incompetent, and as constituting no valid evidence upon which a confirmation should be entered in the cause.

There was also introduced by the claimants, as exhibits 1 to 11 (R., 21, 98–99), certain deeds from the Garcias to the Escobars and thence unto Pendell, one of the plaintiffs in the cause. These conveyances do not require attention, however, in view of the fact that it is stipulated upon the record (R., 144) that M. R. Pendell, one of the plaintiffs herein, has succeeded to at least a portion of such interest (if any) as was held by Francisco Garcia in the premises in controversy in this cause, and thus an interest sufficient to invoke the jurisdiction of the court.

Plaintiffs also introduced in evidence certain dispositions taken before Mr. Justice Stone at El Paso, Tex., and Juarez, Mexico, being the testimony of the following witnesses: Juan Abalos, Pedro Melenudo, Pedro Balazan, Gregorio Herrera, and Jesus Velarde (R., 99), the depositions of these witnesses being found in the record, pages 22 to 68. The testimony of these

witnesses is directed to one or the other of the three following purposes: First, proof of descent by the makers of the deeds in evidence, from Francisco Garcia; second, proof of location of the natural objects named, by the proceedings of 1853 or by reputation, as the boundaries of the grant, and, third, possession by Francisco Garcia and his descendants in title of the premises in dispute. The necessity for a discussion of this testimony so far as it affects the first of these propositions is obviated by the stipulation just mentioned admitting sufficient succession of interest on the part of Pendell to prosecute the suit. The oral testimony on the subject of the location of the boundaries was directed principally to the location of the south boundary, it being an issue as to whether or not the south boundary of the grant was located at the international boundary line, as shown on the preliminary survey of this grant. (Defendant's Exhibit 3, R., 138), or above the Southern Pacific Railroad bridge, which is a considerable distance north of the international boundary line. The Government contended for the latter location, and the claimants, at the beginning of the trial, for the former. The interests represented by Rand and others, the codefendants with the Government, above referred to, were upon the tract of land lying between the international boundary and the south boundary of the grant as contended for by the Government. The decree of the court, to be presently referred to, and as finally entered (R., 138–139), fixes the south boundary at the point contended

for by the Government, and as it was announced by claimants on the hearing that this location, in view of all the proof, was satisfactory to them, it is assumed that no necessity exists for considering so much of the oral testimony as goes simply to the locations of this, the only disputed, boundary. So far as the testimony of these witnesses relative to possession is concerned, that will be considered hereinafter as a part of the argument of the cause.

The claimants likewise tendered in evidence (R., 31, 70–89) the testimony of Samuel Bean, Vicente Garcia, Jose Enriquez, and Eugene Van Patten.

Mr. Bean testified (R., 70) to being 79 years of age and to having known the city of El Paso del Norte, or Juarez, since 1846, having been a soldier in Colonel Doniphan's regiment of Missouri Volunteers in the year just mentioned. Witness testified to their having remained in El Paso del Norte at that time a couple of months, during which time they were quartered in a house that witness learned afterwards belonged to Jose Maria Garcia, with whom witness subsequently became acquainted; that they were quartered in a room adjoining the room where the archives were kept, and, the door being open, the soldiers destroyed the leaves of a ledger, as well as the loose papers, very wantonly. Witness testified (R., 71–72), over objection from the Government that such testimony was hearsay, that he knew the house they occupied belonged to Jose Maria Garcia, because he

was so informed by Garcia some years thereafter. Being asked whether the papers that were destroyed were private papers or public archives, witness testified, over objection from the Government that no proper foundation had been laid for such testimony, that he "understood" them to be public records and they had the "appearance" of being archives. On cross-examination (R., 73) witness admitted that he did not know anything about the residence of Jose Maria Garcia in El Paso del Norte beyond what he learned in conversation from him afterwards in talking about the war, and that he did not know whether said Garcia lived in El Paso in the same house where the soldiers were quartered or in a different house.

The testimony of Vicente Garcia (R., 73), Jose Enriquez (R., 81), and Eugene Van Patten (R., 89) was directed to the same points as the testimony of the witness Juan Abalos and others above referred to, and so far as the same relates to any controverted feature of this case it will be discussed hereinafter.

There was also introduced by plaintiffs (R., 99), over the objection of the Government (R., 100), the testimony of witnesses Clemente Nañes and Maximo Castañeda, taken under commission from the surveyor-general of New Mexico issued to John S. Crouch, clerk of the United States district court for the third district of New Mexico on June 28, 1877, at the town of Mesilla, N. Mex. The taking of this testimony was *ex parte*, there being present only the claimants represented by their attorney, and one of the grounds urged

by the Government for the rejection of this testimony in the court below was the fact that it was not taken before the surveyor-general of New Mexico, and thus under the circumstances which would give the Government the benefit of the presence of its duly authorized officer for the protection of its interests, but was taken before a clerk of court under an attempted delegation of his authority by said surveyor-general; that under the act of July 22, 1854, there was no power in the surveyor-general to delegate such duty and powers, and that the testimony was thus not "lawfully and regularly received" as required by section 5 of the act of March 3, 1891.

The testimony of these two witnesses (R., 113–115) was directed to two points: First, the destruction of the original title of the grant, and second, the possession held by Francisco Garcia and his successors in title.

On the first of these points witness Nañes testified (R., 113) that he had always understood that a grant of land was made to Francisco Garcia by the Mexican Government, and that witness knew that the original grant papers thereof were in the possession of Jose Maria Garcia, the son of Francisco, about the time the American troops took possession of the town of El Paso, and that it was said after they had gone that they had destroyed the original papers of the said grant; this being in the years 1846 and 1847. Witness further testified on this subject that he learned that some time after 1850 Jose Maria Garcia had applied to the

authorities to perpetuate the evidence of said grant, and either in the year 1851, 1852, or 1853 the judge at El Paso took testimony, went on the land and established the boundaries, and put Jose Maria Garcia, as the representative of the heirs of Francisco Garcia, in judicial possession of the land. So far as the testimony of this witness relates to possession under Francisco Garcia, it will be discussed hereinafter.

Witness Maximo Castañeda testified (R., 114) solely as to the possession of the tract, and his testimony will likewise be discussed on the argument as to the matter of possession later in this brief.

Plaintiffs also introduced (R., 100, 119), as Exhibit 14, a map from the office of the surveyor-general of New Mexico. This map, however, as well as the others presented in evidence, was purely upon the question of boundaries of the tract, and as the decree in that respect is, as above pointed out, satisfactory to both parties this portion of the testimony does not require further notice.

There was also introduced by plaintiffs (R., 100, 120) the opinion of Surveyor-General Atkinson favorable to this grant and recommending it for confirmation by Congress.

On behalf of the Government the subsequent opinion of Surveyor-General Julian was presented (R., 100, 137), recommending the rejection of this grant on the ground that it was not recorded in the archives of Mexico, as required by the Gadsden treaty.

On behalf of the Government there was also presented the petition of the claimants before the surveyor-general of New Mexico (R., 21, 122), showing that this grant was claimed as located above the international boundary line, this testimony being in support of the Government's contention as to the location of the south boundary. To the same purpose was directed the testimony of L. H. Davis (R., 100) and John R. Randolph (R., 106). The form of the decree, however, as to the location of the south boundary obviates the necessity of a discussion of this portion of the Government's testimony.

On behalf of the Government there was also presented the muniments of title in the Refugio Colony case, reported No. 90 (R., 21, 123–130). This Refugio Colony grant is located directly north of the premises in controversy, as shown by Defendant's Exhibit 3 (R., 138). The purpose of the introduction of these papers was to meet the suggestion made in the written opinion of Surveyor-General Atkinson (R., 122), to the effect that the claim herein asserted found corroboration in the mention of said Refugio papers of Jose Maria Garcia as having land on the south of the Refugio grant. A careful inspection of these Refugio titles shows, however, that the lands of Jose Maria Garcia therein referred to were not lands owned by him *outside* of the Refugio grant, but *within* it; the allotted lands of said Refugio grant being from the north boundary of the lands of Jose de la Luz Jaquez, who was one of the allottees thereunder, to the south of the lands of Jose Maria Garcia, who was likewise one of the allottees

thereunder. That Garcia had such relation to the Refugio grant is shown on pages 128, 129, and 130 of the record, where his name appears in at least three communications to the political chief of the district of Bravos in relation to the Refugio grant. It similarly appears in the testimony of the witness, Jesus Enriquez (R., 85), where he testifies that Jose Maria Garcia had lands in the Refugio grant, at the south end of it, and further testified in substance that the boundary named by Father Ortiz in the Refugio grant was the boundary of the land that Jose Maria Garcia had under the Refugio grant and not under the Santa Teresa grant. Indeed, as above seen, the Santa Teresa grant was not owned by Jose Maria Garcia, but by his mother's heirs, of whom he was only one, so that the reference in the Refugio grant could not have been to his Santa Teresa holding. The relation of these facts to the alleged possession by claimants of the Santa Teresa tract will be discussed hereinafter.

There was also presented on behalf of the Government (R., 21, 130–136) the proceedings and plat of what is known as the Guadalupe Miranda grant, lying for a distance of about 5,000 varas, or over 2 miles, north of the international boundary line, and thus over a large portion of the premises claimed in this suit. This clearly appears in the plat introduced as defendant's Exhibit D (R., 136). While these proceedings and this plat were introduced primarily as bearing on the proper location of the south boundary of the Santa Teresa grant—an issue eliminated by the decree—they are instructive as showing that for many years a

large portion of the tract which, it is asserted, has been universally recognized as belonging to the Garcias was claimed by Guadalupe Miranda and his successors in interest, and that these successors in interest thought enough of their claim to file a petition therefor in the Court of Private Land Claims, asking a confirmation to them of a large portion of what the claimants in this case assert has always been universally recognized as belonging to the Garcia family and their successors in title.

The cause being submitted to the court on August 30, 1899, upon the record just outlined, the court, at its April term, 1900 (R., 139), through Mr. Justice Sluss, announced its decision confirming the grant, and a decree embodying this decision was entered at the August term, 1900 (R., 138–139). Mr. Justice Murray dissented on the ground that there had been a failure to show that the grant had been recorded in the proper archives in Mexico, as required by the Gadsden treaty, and in this opinion Mr. Justice Fuller concurred, further holding that the court erred in admitting in evidence the proceedings had before the judge of the first instance in 1853 (R., 141–142).

On September 21, 1900, the Government sued out an appeal to this court (R., 143).

BRIEF AND ARGUMENT.

The decision of the court below should be reversed, and the claim rejected, for the following reasons:

1. There is no sufficient proof of a grant lawfully and regularly derived from the Government of Spain or Mexico.

2. The possession shown by plaintiffs does not justify the presumption of a grant from competent authority.

3. There is no proof that this grant was duly recorded in the archives of Mexico, as required by article 6 of the Gadsden treaty.

I.

There is no sufficient proof of a grant lawfully and regularly derived from the Government of Spain or Mexico.

The only documentary evidence of a grant presented by claimants was the certified copy of the proceedings of 1853 before the second judge of the first instance at El Paso del Norte, the contents of which have already been discussed. The majority of the court below received this proceeding as evidence against the Government and confirmed the grant. Was that holding correct?

Assuming *arguendo* that these proceedings were properly received, it is respectfully submitted that there is nothing in them to justify a confirmation. Recalling that the burden is upon the claimants to show a title lawfully and regularly derived from the Government of Spain or Mexico, this proceeding falls very far short of establishing such a title. The only witnesses who testified before Lopez in 1853 as to the official who executed the grant were Francisco Rascon (R., 12) and Jose Maria Maese (R., 13). The former testified that he had had in his hands many times the possession and original documents of the Santa Teresa ranch, authenticated by "*one of the lieutenant-governors* that governed in this district about the close of the last century." As

the only district which had been named by witness was the district of Concepcion, it is assumed that his testimony, when fairly construed, means that the original documents were signed by a lieutenant-governor of the district of Concepcion. It requires no citation of authority to show that such an officer possessed no power to make a grant at that date. Assuming, as alleged in the petition, that the land in question was in New Biscay, the power to grant it from 1786 to the end of the eighteenth century was vested in the intendants, acting in conjunction with the superior board of the treasury under the provisions of the ordinance of December 4, 1786 (Reynolds, p. 59). Lieutenant-governors had no such power. If the grant is to rest upon this proof as to the officer who signed it, it must thus fail for the reason that it thus affirmatively appears that there was a lack of power in the granting officer. Jose Maria Maese, the other witness who testified as to the granting officer (R., 13), deposed that he remembered to have seen the title papers to the Santa Teresa "given by a lieutenant-governor of this town [Paso del Norte] in the time of the Spanish rule." This is simply confirmatory of the testimony of the witness Rascon, and thus of the fact that the original documents, whatever they were, were made by an officer lacking in authority to alienate Crown lands. Nor does the proof of possession tendered before the judge of the first instance in 1853 improve the case from claimant's standpoint. Such possession is referable to the title papers mentioned by witness,

to wit, a grant made by a lieutenant-governor, an officer lacking in power to make a grant. The void concession by a lieutenant-governor of the district of Concepcion or the town of El Paso accounts for the possession proved and furnishes a plain and unmistakable cause to which it is referable. The facts on this point bring the case squarely within the rule laid down by the supreme court of California in the well-considered case of *Nieto* v. *Carpenter* (21 Cal., 455), where it is said:

> Presumptions are only indulged to supply the absence of facts. There can be no presumption against ascertained and established facts. The presumption, therefore, of a grant from the long possession of land is repelled and destroyed by the production or proof of the instrument under which the possession was held.

To the same effect is *Hayes* v. *United States* (175 U. S., 248, 261).

But it is most confidently submitted by the Government that whatever the contents of the proceedings of 1853, those proceedings were illegal and therefore were improperly considered by the court below, and the court erred in yielding to them any probative effect.

It is uncertain whether these proceedings were simply an attempt to perpetuate the testimony of certain witnesses or were designed to secure the judgment of the court as to the validity of the Garcia claim. If the purpose was the latter, the proceeding was certainly void, since it was entirely *ex parte*, and under

the Mexican system, as under that of every other, the world over, a judgment to have any validity must have been upon notice to the adverse party. There was no pretense in this case that any such notice was given the officials of the Mexican Government; so that, even assuming that the Government was subject to a suit from one of its citizens to quiet title to a tract of land, such proceeding was entirely nugatory, since it proceeded *ex parte* and without the participation of the adverse party. No law has been shown—nor can the principles of justice tolerate the idea that such law can exist—under which a judge in Mexico could take testimony and render a binding judgment in the absence of notice and opportunity to defend by the party adversely interested. To assume that such a power existed as between individuals is to hold that Mexico had no respect for private property rights; to hold that it existed as between an individual and the Government is to hold that the Government practically abdicated to its courts the power to alienate its lands, for in results there was no practical difference between exercising the power to grant lands and exercising the power to adjudicate them away without notice. Since such an adjudication was not valid against the Mexican Government, it is not valid against this Government. It was held by the court below, however, that this proceeding of 1853 was one to perpetuate testimony, and that the testimony was taken is proof against the Government now. It is to be noted that, while the taking of the deposition of the witnesses was

in the nature of a perpetuation of testimony, the adjudication based upon that testimony and the formal investiture of possession, both conducted by the judge who heard the testimony, were much beyond the purview of a mere perpetuation of testimony. But considering it a mere proceeding to take testimony, no law was produced and it is not believed that any law can be found under which a Mexican judge was authorized in 1853 to take testimony against the Government, much less to make an adjudication based on such testimony and thereupon to deliver possession of the land. If such law exists the burden was upon the claimants to present it, but this they absolutely failed to do. The only law cited by the court to sustain the admission of this testimony is the law of May 23, 1837 That law is found at page 401 of volume 3 of Dublan y Lozano's Legislacion Mexicana (section 93), and is a reenactment of article 14 of the decree of July 22, 1833 (Reynolds, p. 173). The law as translated is as follows:

> The judges of first instance in their respective territories shall have cognizance, by way of precaution, with the alcaldes of the same in the making of inventories, evidence *ad perpetuam*, and other judicial proceedings of like nature in which there is no opposition of parties.

While this law gave the power to judges of first instance to take testimony *ad perpetuam*, such power was not one to proceed *ex parte* to examine witnesses and to render judgments against either private citizens or the Government. On the contrary, it was the power

simply to proceed in certain cases and upon certain conditions, in default of a compliance with which the proceeding was simply void.

Thus, *informacion ad perpetuam* or *ad perpetuam rei memoriam* is defined by Escriche's Dictionary of Legislation and Jurisprudence as follows (p. 867):

> Testimony *ad perpetuam*, or *ad perpetuam rei memoriam.*
>
> The verification of proof which is made judicially and by way of precaution that something may hereafter be shown. Generally speaking, the depositions of witnesses are not received except in law suits and causes; but it sometimes happens that a person may lose his right if he is not permitted at once to take his testimony against the time when he may be in a situation to make use of it; when one fears, for instance, that his adversary intends or may intend to bring suit against him after the death of some old or invalid persons or in the absence of others upon whose declaration he must support his rights or exceptions. In this case, then, and other similar cases, the party in interest has the right to ask the judge to receive the declaration of witnesses beforehand, after citing the person who has an adverse interest in the matter, and in his default or absence, before two good men to witness the oath. *Law 2, Title 16, Partida 3.* Instead of the two good men, the syndic (city or town attorney) is now cited, and the testimony is sent to him at once for his action, which is restricted to stating whether or not he has anything to say against the witnesses. Said law adds that if the testimony you had been

taking in the absence of the person against whom it is to be used, he should be given notice of it or it should be denounced within one year after his return, or rather the suit should be begun within said term, under penalty that the testimony shall have no force after the year. The same law also states that this testimony is of no avail in criminal causes which may result in death or loss of a member or exile from the country, except in general investigations made officially.

The law of the Partidas cited in the definition above given is as follows (L. Moreau Lisle and Henry Carleton's translation, vol. 1, p. 194):

Witnesses can not be heard until after the suit is begun by petition and answer, unless in particular cases, wherein, if they are not heard before, the rights of the parties might be lost, as where they upon whom the parties relied to prove their claims were so old or infirm that there were apprehensions of their dying before their testimony could be taken; or when they were about to set out to join the army, or to go on a pilgrimage or to any other place to stay so long a time that it were doubtful whether they would return. In either of these cases their testimony may be taken before the suit is begun by answer. But the judge who takes it ought previously to notify the adverse party, if he were in the place, that he might, if he choose, be present at their examination. And if he did not choose to come, or were not in the place, the judge ought nevertheless to proceed to take their testimony, swearing the witnesses in the presence of good men,

writing down what they say, and sealing it up with his seal, that it may be safely kept until it should be wanted. We also say that if he against whom the testimony was taken was not then in the country the other party must notify him of it within one year if he returns, or to bring his suit within that time for the thing concerning which the testimony was taken, and if he suffer the year to elapse without doing either, the testimony of the witnesses so taken shall no longer be of any effect. Yet, if the witnesses were still alive and the plaintiff wish to produce them personally to prove his claim, the defendant can not prevent it, under pretense that their testimony had already been taken and was of no avail because not notified to him within one year, as is above said.

In this proceeding, however, none of the steps prescribed by law were taken to insure the validity of the proceeding. It is not alleged as a basis for the application that the witnesses were old or infirm, or that they were about to join the army or to go out of the country. No pretense was made by the judge of notifying the officers of the Government or any other adverse party of the intention to take this testimony.

Not content with taking testimony *ex parte* and without notice, the second judge of first instance proceeds to render judgment for the claimant and to invest him with a new possession. This was nothing more or less than an attempt to revalidate the grant. Since he had no power to make the grant in the first instance, he had no power to revalidate it; that was, as shown by

the Arizona cases just cited, an executive not a judicial function. Similar proceedings were considered by this court in *Whitney* v. *United States* (167 U. S., 529, 543, 544), and it was held that, since the Crown was no party to the proceedings, they could not be considered in the light of *res adjudicata*. It is respectfully submitted, therefore, that neither the testimony taken before Lopez nor his judgment and investiture of possession are entitled to be received as evidence or to be given the slightest probative effect. With this proceeding out of the case, there is absolutely nothing upon which claimants can demand a confirmation, unless it be the evidence produced, outside of the proceedings of 1853, to establish possession. This testimony will be next considered.

II.

The possession shown by plaintiffs does not justify the presumption of a grant from competent authority.

The attention of the court has already been directed to the fact that if the proceedings of 1853 are to be considered as evidence the possession therein shown is referable to a grant made by an officer without authority to make it, and is thus incapable of raising the presumption of a grant. Considering those proceedings as evidence, not only is the possession which they show colored by the fact of its illegal origin, but so also is all the proof of possession furnished by plaintiffs *dehors* that proceeding. In that view of the matter a discussion of plaintiffs' oral testimony as to possession becomes

unnecessary. Assuming, however, as has just been urged, that the proceedings of 1853 are not properly before the court and are out of the case, there remains to be considered what effect is to be given the remaining testimony on the subject of possession. Is it sufficient to create the presumption of a grant, and assuming that it is, can the Court of Private Land Claims confirm a claim based solely on the presumptions flowing from possession?

A number of witnesses were produced by claimants to establish the possession of the Garcias, but it is not believed that this possession was either continuous or exclusive, both of which qualities are essential to a prescriptive title. As was said by this court in the case of *Whitney* v. *United States* (167 U. S., 529, 546):

> The claimant also relies upon a long-continued adverse possession of this land, maintained for nearly one hundred and seventy years from the date of the grant, and nearly eighty years from the date of the *testimonio* issued by the alcalde mayor, Baca. Had it been shown that this possession was complete, adverse, and undisputed during the whole life of the grant, such possession would probably be regarded as complete evidence of title. Now, are we disposed to deny that the fact that the Luceros and their descendants pastured stock upon these lands is evidence of such possession? But in order to make it of any particular weight it should be shown to have been exclusive, and that no other person pastured or had the same right to pasture upon these lands. The

proceedings in the case, first above mentioned, of the intrusion by the Romeros indicate the lands to have been subject to pasture by the Indians, and other residents of that neighborhood. Under such circumstances it should be made to appear that the right of Lucero and his descendants were exclusive in this particular. In addition to this, however, it is a fact, so notorious that we may take judicial notice of it, that mere pasture on these western lands is very slight evidence of possession. The court below was of opinion that "from a practical standpoint the grazing of stock in this country has no value as evidence of practical location." In view of the fact that all or nearly all of this testimony respecting possession is given by witnesses who are descended from Lucero, or connected with his family, or are interested in the litigation, and the possession relied upon is not shown to have been exclusive or inconsistent with the use of this vast tract as a pasturage common to all the dwellers in that neighborhood, we think the court did not err in refusing to give it weight as evidence of title.

See also *Bergere* v. *United States* (168 U. S., 79, 80).

The testimony of Clemente Nañes and Maximo Castañeda (R., 113–115), taken under commission from the surveyor-general of New Mexico before a clerk of one of the district courts of New Mexico, was presented by claimants under section 5 of the land-court act allowing testimony which has been "lawfully and regularly received by the surveyor-general of New Mexico" to be used when the witnesses are dead. As

a preliminary consideration, it is submitted by the Government that this testimony was not "lawfully and regularly received by the surveyor-general of New Mexico" for the reason that he had no power to delegate the taking of testimony to the clerk of a district court. Section 8 of the act of 1854, under which the surveyor-general took cognizance of this claim, is as follows:

> SEC. 8. *And be it further enacted*, That it shall be the duty of the surveyor-general, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico, and for these purposes may issue notices, summon witnesses, administer oaths, and do and perform all necessary acts in the premises.

It is evident that the purpose of this act was to provide an official who should exercise a more than perfunctory supervision of these matters. The duty imposed was evidently a personal duty. He could not delegate it to others. It was obviously his duty to be present at all hearings affecting grants, to hear the testimony, to see the witnesses, to cross-examine them. No power was given him by statute to issue commissions to take depositions, and none of the instructions subsequently issued by the Secretary of the Interior gave him any such power. The reason was very evident. In matters of this character the Government was entitled to representation. While the

investigation of these matters by the surveyor-general of New Mexico can not be said to have been in all or many of these cases of very great thoroughness, still his neglect of duty in no degree detracts from the position that the law required him to perform that duty.

The present record is an illustration of this wisdom of the requirement of the law and the danger involved in disregarding it. Here there were not even interrogatories framed by the surveyor-general, but all that was done was to issue a commission addressed to the clerk of the third judicial district of the Territory of New Mexico, directing him to take the testimony. This was taken in narrative form and returned to the surveyor-general. It was in effect an affidavit. There were thrown around its taking none of the safeguards contemplated by law, and it was in reality a delegation by him to a clerk of a district court of the performance of the duties of the surveyor-general of New Mexico. The deposition of these witnesses was not lawfully taken, so that it was not within the terms of the statute providing for the admission of testimony "lawfully and regularly received." But even if it be considered technically admissible under section 5 of the land court act, the circumstances under which it was taken—before a person having no interest in getting at the truth and without cross-examination—entitle it to but little weight. It was doubtless because of the well-known fact that much of the testimony presented to the several surveyors-general under the act of 1854 was, even when given before those officials themselves, taken without the safeguards afforded by a court of

justice that Congress inserted as a positive provision in the act of 1891 that that testimony should be given by the court only "such weight as in its judgment, under all the circumstances, it ought to have." It is respectfully submitted that the "circumstances" of the taking of this testimony condemns it to be adjudged, under the statute, of little weight.

Coming, now, to a consideration of the testimony of these two witnesses, it will be noted (R., 113, 114) that the acquaintance of Clemente Nañes with the property extended back only to 1840 and that of Maximo Castañeda only from a date a year or two earlier. Thus the length of possession prior to the treaty, which either of them establishes, is below the period which would give a prescriptive title (*Hayes* v. *United States*, 170 U. S., 637). Nañes testified (R., 113) that during the time he had known the property, from 1840 up to a year or so before 1877, the property had been occupied by the heirs and children of Francisco Garcia and his wife, especially by his son, Jose Maria Garcia, by pasturing and keeping animals on it and by cultivation, there being also houses, corrals, and other improvements on it. In view of the petition of Garcia in 1853, showing that he was at that time a resident of the town of El Paso (R., 10), the testimony of claimants' witness Bean (R., 72), that from 1854 to 1860 Garcia was living at Amoles, which is 6 or 7 miles north from the grant, the testimony of claimants' witness Van Patten that from 1859 on Garcia was living at Amoles, it would seem that the testimony of this witness as to the consecutiveness of occupation by the

Garcias is hardly justified. The testimony of Castañeda to the same effect (R., 114) is subject to like criticism. When it reflected that neither of these witnesses were cross-examined and their depositions were practically affidavits, it is not believed that this testimony will be given much weight as against the evidence presently to be considered, showing that the so-called possession was not by any means exclusive, but was shared with practically the whole country.

Juan Abalos testified for claimants (R., 22–34) as to the Garcia family and the possession of the property from the year 1850. His knowledge was evidently very limited, however, for he testified that Juan Antonio Garcia was the father of Jose Maria Garcia and Josefa Horcasitas Garcia was the latter's sister-in-law, whereas as a matter of fact the latter was Jose Maria Garcia's mother and the father of Jose Maria Garcia was Francisco Garcia, not Juan Antonio Garcia. He likewise (R., 24) fixed the Piedras Paradas as the north boundary of the grant, whereas the whole record and the decree show that it is the south boundary. He placed it 2 leagues from the east boundary, the river (R., 32), when as a matter of fact it is at the river. The rest of his testimony shows a similar confusion of the subject, that is in part accounted for by the fact that witness had not visited the premises since 1854 (R., 25, 29). Witness testified that he had worked for Jose Maria Garcia about 1850 for a month (R., 23), and described the improvements, which he states were located at a place called La Isla. It will be noted in the testimony of the other

witnesses that most of the occupation and improvements ascribed to Jose Maria Garcia were in or around La Isla. When it is noted, however, that La Isla is in the Refugio grant (R., 79, 85), and that Jose Maria Garcia was a grantee under that grant, which joins the Santa Teresa claim on the north (R., 85, 126–130), it will be seen that his possessions at La Isla lose all significance as supporting his claim to the Santa Teresa tract, and are rather to be construed as referable to his Refugio grant holdings. Witness Abalos goes somewhat into detail (R., 25–27) as to the possession held by Garcia on the Santa Teresa tract, the public notoriety attached to this possession, and the fact that persons secured permission from Garcia to plant on the land. Witness fixed the old ruins of the houses of the father of Jose Maria Garcia at a place "a little above La Isla" (R., 26), and thus within the Refugio grant. It is very peculiar that if Jose Maria Garcia owned the tract in question, including La Isla, by virtue of this Santa Teresa claim, he was one of the foremost of those applying for the Refugio grant. An inspection of the proceedings of the latter grant (R., 126–130) will show the prominence which he assumed in securing that grant, his name appearing in every one of the four documents introduced as defendant's Exhibit "BB." It is further noticeable that the portion of the Refugio tract assigned to him was the southern portion, including La Isla, and thus the very portion which the testimony of Abalos and others indicates to have been the ancient settlement of the elder Garcia, the alleged grantee of the Santa Teresa

tract. If the Garcias already owned this land, it is hard to understand why Jose Maria Garcia would have entered so strenuously and so prominently upon the task of getting it a second time from the Government. On cross-examination, witness developed quite clearly the character of the possession of the tract during the four years—from 1850 to 1854—that he knew it. Thus he testified (R., 29), as follows:

Q. You spoke of Jose Maria Garcia having flocks of animals?

A. Yes.

Q. I believe you said that he pastured his animals on the prairie. Did he?

A. Yes; and they come down to the river.

Q. People in those days pastured animals wherever they could find pastures?

A. Yes; *they had no obstacles against it.*

Q. *He pastured his animals off for miles from his ranch,* did he not?

A. Yes.

Q. *Off of this tract of land that you spoke of?*

A. Yes.

Q. *Wherever he could find pasture?*

A. Yes.

Q. And people that had animals there pastured wherever they could find pasture, too, did they?

A. Yes; *they were at large.*

Q. Both off and on this tract, wherever they could find pasture?

A. Yes.

Q. *All that country at that time was common pasturage?*

A. Yes.

Pedro Melenudo, another witness for claimants, testified (R., 35–49) to his having been born in 1810; to having worked on the Santa Teresa ranch from 1842 to 1844, during which time Jose Maria Garcia pastured there, and to having known one of the monuments of the ranch, placed there by Jose Maria Garcia, and also to having known a marked cottonwood (R., 37, 42) as the north boundary in 1842 (although it was not, as a matter of fact, marked until 1853). He also stated that the Garcias planted vegetables, etc., there, but only for a little while, and only in patches, and that not by irrigation, but by temporales, i. e., depending on the seasons for water (R., 38). Witness also testified (R., 38) that Jose Maria Garcia and his family lived there at that time, and that on the property claimed by Garcia there were houses and ruins of houses and corrals; that they would drive people away who came with animals, and the wood that was taken out was by the Garcias' written consent. On cross-examination witness developed the fact that he had only worked for Garcia a year, in 1842, and had then moved to Dona Ana, 20 or 30 miles away, where he had lived ever since (R., 41), and that all he knew was what happened in that year when he was there (R., 40). He also testified that he knew personally the father of Jose Maria Garcia, under whom the latter claimed the grant. This testimony, therefore, as to the character of possession held by Garcia the elder is most pertinent (R., 40–41).

Q. I believe you said you *knew the father of Jose Maria Garcia?*

A. *Don Juan Antonio Garcia*, and the wife of Don Antonio Garcia, Dona Josefa.

Q. Did you ever see them?

A. Yes.

Q. Where did you see them?

A. I used to work for him also, as I was 14 years old.

Q. Was that while you were living in El Paso or Juarez?

A. Yes; *but I worked at El Brazito.*

Q. And you worked for Juan Antonio Garcia, the father of *Jose Maria Garcia, in Brazito*, did you?

A. *Yes; herding animals.*

Q. In what year was that?

A. *In 1824.*

Q. When was the last time you knew Juan Antonio Garcia?

A. When I was at *the ranch of Don Antonio at Brazito, in the year 1824.*

Q. Do you know how old you were when Don Antonio Garcia died?

A. Yes; I was 14 years old.

Q. He died in 1824, you say?

A. Yes.

Q. Was that where he was living when he died?

A. Yes.

Q. How long had you been working for him at Brazito before he died?

A. I had worked about one year.

Q. Had he been living at Brazito during that year?

A. Yes; he had his animals—stock—there.

Q. And had his family there?

A. No; *the family* was not there.

Q. Did he have houses there?

A. Yes.

Q. Did he live in the house while you worked for him?

A. Yes.

Q. How much land did he have at Brazito?

A. I do not know how much land he had there, but he had quite a large tract of land.

Q. That was *when he lived there with his flocks?*

A. *Yes; all his stock was there—that he had—was there.*

Brazito is on the east side of the Rio Grande (R, 41) and miles away from this tract, so that the testimony of this witness clearly established the fact that Garcia the elder did not hold consecutive possession of the Santa Teresa grant, but, on the contrary, was living miles away, "with all his stock," in 1824, and, in fact, died far away from this property. This was thus a distinct break in the continuity of the possession, which precludes the presumption of a title under the Spanish law governing prescription. Quite as pertinent is the testimony of this witness as to the lack of exclusiveness in the possession of this tract. Thus he testifies (R., 41):

Q. You spoke of Jose Maria Garcia pasturing his flocks there in this place that you spoke of?

A. Yes; in Santa Teresa.

Q. People in those days pastured their flocks wherever they could find pasture, did they not?

A. Yes.

Q. And Jose Maria Garcia pastured his flocks out on the prairie, for miles away from his ranch, did he not?

A. Yes.

Q. And other people pastured their flocks right there near his ranch, did they?

A. Yes; also.

Q. Came down to the river there to get the water for their flocks?

A. Yes.

Q. And in times of that kind you do not mean to say that they asked the consent of Jose Maria Garcia every time they pastured there, do you?

A. No; the animals were loose.

Q. And pastures were common in those days, were they not?

A. Yes.

Q. And people pastured on this tract of land that you have spoken of as Santa Teresa tract without the consent of Jose Maria Garcia, did they not?

A. Yes.

Q. And they have done it ever since you have known that tract, have they not?

A. Yes.

Pedro Balizan, likewise produced for claimants, testified (R., 49–52) to being 89 years of age, to knowing the Santa Teresa tract, and to having hauled wood from there to El Paso for two years, from 1850, by written permission of Jose Maria Garcia. Witness testified that Garcia was at that time living in El Paso, but afterwards moved to La Isla, which, it will be recalled, was acquired by him as a part of the Refugio

grant in 1851. The testimony of this witness as to possession was adduced by counsel over the objection of the Government under the following line of examination, which is quoted as illustrative of the form of many of the questions by which claimants' counsel, at least on direct examination, was able to secure very impressive proof of possession. Thus on page 50 appears the following:

Q. Where was Don Jose Maria Garcia when he gave you that order?

A. He was in El Paso.

Q. At that time was he living up there?

A. He was living in El Paso.

Q. Did he have any ranch up there?

A. Yes.

Q. Did he have any peons or employees?

A. Yes; he had.

Q. Did he have any animals?

A. Yes.

Q. Did he have any cultivated lands?

A. Yes; he planted some strips of land.

Q. What animals did he have up there?

A. He had cows, he had sheep.

Q. Did he have any buildings or improvements?

A. Yes.

Q. What kind of houses did he have?

A. He had some jacales.

Q. Any corrals?

A. Yes.

Q. At what place were his houses?

A. They were here, and then they were moved to La Isla—to the island.

This line of examination was permitted subject to the Government's objection, but the form of the interrogatories at least suggest that the resulting answers are to be taken with a grain of allowance. On cross-examination witness admitted that his only knowledge of the place was for two years, about 1850, and that the place where Garcia had his flocks and was occupying was at La Isla, which, as we have seen, is in the Refugio grant (R., 52).

Gregorio Herrera, likewise examined for claimants, testified (R., 52) to being 85 years of age and to living at Chamisal, Mexico, and to his acquaintance with the Garcia family. He testified to having known the ranch of Santa Teresa for more than fifty years, and thus, from some date, not shown by the evidence, prior to 1848. Witness stated that when he first knew it Francisco Garcia had a small house, large corrals, and animals and four or five employees on the tract, and claimed the ranch (R., 55, 56) out to the plains under a Spanish grant, as witness once heard. Witness testified to having cut timber on this ranch, and that the wood in these *bosques*, or trunks of trees, was free then.

On cross-examination witness was asked (R., 57):

> Q. You say these bosques where you cut wood were free, were they?
>
> A. Yes; there was no owners of them.
>
> Q. Everybody cut wood there, did they?
>
> A. Everybody went there and cut them, and nobody said it was their property.
>
> Q. Nobody claimed that property?
>
> A. No.

Q. Which side of the river was that?

A. On both sides they cut wood.

Q. People cut on both sides, did they, of the river?

A. Yes.

Q. And nobody claimed on either side that as their property?

A. No.

That this free and general use of timber was on the property in question is shown by the subsequent testimony of the witness (R. 57, 58) to the effect that it was taken from the vicinity of the Piedras Paradas, the south boundary of the claim, both above and below that point. So, also, the witness demonstrated that the pasturage there was free to all, and that no exclusive dominion over it was exercised by the Garcias. A few extracts from the testimony will suffice to illustrate this (R. 58, 59):

Q. How far up the river from the Piedras Paradas did they get wood; all along the river?

A. Yes; the woods was full on both sides.

Q. On both sides of the river they got wood?

A. Yes.

Q. And nobody ever objected to their getting wood?

A. No; all the world could go there and get wood.

Q. About pasturage in that vicinity—did everybody pasture up there along that Piedras Paradas?

A. They pastured on both sides of the river, and they had a ranch on the other side at a

place called Duran Nieto, and when the Indian raids began they had to abandon these ranches.

Q. So in that time people pastured cattle wherever they could find pasture? Is that not true?

A. Yes; my father had over a hundred cattle there and asked nobody, but the Indians finished up with everything we had there.

Q. How close to the Piedras Paradas was it that your father pastured his stock?

A. From Piedras Paradas this way and out on the plains they would come down there and drink water and nobody would say anything about it.

Q. From Piedras Paradas down this way and out toward the plains, did you say?

A. Yes.

Q. From Piedras Paradas up the river, too, did they pasture?

A. Yes.

Q. Everybody pastured there?

A. Yes; cattle and cows and oxen.

Q. And nobody ever objected to their pasturing in this vicinity you have described?

A. Nobody would say anything; it was a free country; everything was free there.

* * * * *

Q. Where did Jose Maria Garcia have his ranch out there?

A. He had a ranch at Corral de Tapia.

Q. Did he have any ranch at La Isla?

A. He herded his stock up there, above and below there.

Q. Everybody did that, did they?

A. Yes; everybody would pasture and nobody would say anything to them; both cattle and oxen and cows.

Q. In those days a man did not have to own land to pasture on it, did he?

A. Nobody; everything was free.

Further testimony of witnesses on the same subject is found at pages 61–62 of the record. Recalling that the Southern Pacific bridge referred to is just south of this grant as confirmed, the following extracts appear relevant, as showing the lack of exclusiveness in the possession:

Q. From that bridge up the river is it true that the people at that time got wood of any kind whatever they could find all along on the river?

A. They went in and took their wood, and nobody would object—nobody; it was free to everybody.

Q. That was from the bridge up the river?

A. Yes.

Q. They took from the bridge up the river for many miles. Is it not true?

A. Right near there, on this side; and on the other side it was free also.

Q. So that on both sides of the river people got wood in those days wherever they could find it?

A. Yes; right here in front; on the other side it was also free. McGuffin used to take it there formerly to El Paso. I have property over on the other side.

Q. And when you first knew that place the people pastured all around there, going upon the river?

A. Yes.

Q. They came down and brought their flocks to the river to pasture them. Is that not true?

A. They would come down to the river, and they would turn them loose.

* * * * *

Q. Now, my question is, at that time is it not true that everybody pastured their flocks on both sides of the river, near that bridge, and up the river from that bridge?

A. Yes.

Q. And nobody objected to their pasturing that way?

A. Nobody.

Q. And they pastured on both sides of the river for miles from that bridge. Is that not true?

A. Yes; and a man could go and get wood and nobody would say anything to him.

Jesus Velarde, examined for the plaintiffs (R., 62), testified to his being 65 years of age and thus born in 1833, and to his having lived all his life in Juarez or Paso del Norte. Witness testified to knowing the tract of Santa Teresa now held by Escobar (R., 63), although he had not been there since 1854 (R., 68), and that witness had his cattle there, claiming an interest in the land under another grant given him (R., 65) or to his father (R., 66) by the Mexican Government. Witness testified that the Escobars had driven him out after they bought from the Garcias, which it may be here

remarked was some time after the treaty. He also testified that the Garcias had occupied the lands there a long time with animals, employees, and had a little house there; that they had had it ever since witness "opened his eyes" and witness understood it belonged to Garcia (R., 64, 65). On cross-examination witness testified further as to this concession to his family as follows (R., 66):

> Q. At that time your father was pasturing there and had control of the land that he claimed as a concession, was he?
>
> A. Yes.
>
> Q. And was occupying it and claiming it, was he?
>
> A. Yes.
>
> Q. And he continued to occupy and claim, did he not, until the Americans took possession of this country?
>
> A. I had my cattle there for years; then the Americans came and I had nothing more there.
>
> Q. And you had your cattle there under this concession made to your father under the Mexican Government?
>
> A. Yes; I had my cattle there under this concession.

As bearing on the character of the possession exercised over this tract and the fact that it was not exclusive in the Garcias, the following testimony (bearing in mind the fact that the tract runs from the Piedras Paradas north along the river) is exceedingly pertinent (R. 67):

> Q. Along the river at that time a great many people pastured, did they not?

A. Yes.

Q. People pastured all along the river on both sides of the Piedras Paradas; people pastured all the way up?

A. All that way, and always pastured up that way.

Q. And nobody objected to their pasturage?

A. No.

Q. It is considered as public pasturing grounds, was it?

A. Everybody would pasture there as public ground; everybody pastured.

Q. On both sides of the river?

A. Wherever there was a crossing we would go across, back and forth; when we would cross over there we would very often find all the oxen and horses there on the other side of the river.

Q. And other people pastured their oxen and horses on the other side of the river, too?

A. All El Paso pastured up there.

Q. And the people got wood up there, on both sides of the river?

A. Yes.

Q. From the Piedras Paradas, up the river on both sides?

A. Yes; from Piedras Paradas above, wherever they wished to.

Q. For miles?

A. Yes; up to a little place called Coronas.

Q. How many miles—leagues—is that above Piedras Paradas?

A. About 4 or 5 leagues—a little more or less.

Q. Nobody made any objection to their go-

ing there to cut wood on both sides of the river from Piedras Paradas up?

A. No; not that I know of.

Witness, also, in his testimony on cross-examination, corroborated the witnesses already mentioned (R., 68), on the point that Jose Maria Garcia lived for a long time at La Isla and at Amoles, each settlement being in the Refugio grant and outside of this grant, and that Garcia died at the latter place and was brought therefrom for his burial.

Vicente Garcia was also called by claimants (R., 73), and testified that he was born in 1837 and was a nephew of José Maria Garcia. From his testimony it appears that his first knowledge of the tract in question was in 1853, when he had crossed on his way from El Paso to Mesilla, although witness had before heard of it from his father. Witness also testified that his father had told him he had a grant there, and also had shown him the northwest corner, which was a sort of monument made of stone and mortar, about a foot and a half high, and being located about 5 or 6 miles to the west of the Rio Grande, in the hills opposite the Ancon de Cobreña (R., 74, 75), and that he had first seen this monument about twenty years ago (R., 79). Witness further testified that when he first knew the property—which was the year of the treaty—it was the property of Jose Maria Garcia, and his father also had an interest there, and that they used the property for stock when the Indians did not drive them away, and also had adobe houses and corrals. Witness was of the

recollection that no lands were cultivated there when he knew the tract (R., 77), and that one Sebastian Bermudas also occupied part of the land, but by permission of Jose Maria Garcia (R., 78). On cross-examination witness testified to the fact already referred to that he lived at La Isla, and that this was the same place where Jose Maria Garcia used to live; that the latter had an interest in the Refugio grant, and his lands were at La Isla, and that *La Isla was in the Refugio grant.*

Jesus Enriquez testified for claimants (R., 81) that he had known the tract of Santa Teresa since 1852, and knew the north boundary to be at La Cobreña, and knew a monument on the north boundary near there; that La Isla was north of La Cobreña (R., 88); that he had known of this monument since he was twelve or fourteen (i. e., from about 1854), and learned of it from his father, who worked for Jose Maria Garcia on the Santa Teresa grant, and that he also knew, in 1852 (R., 87), of a cottonwood tree that had a cross on it and stones around it, located at the Rincon de Cobreña, and being, according to Jose Maria Garcia and the father of witness, a boundary tree. As this tree was not marked as a boundary until 1853, the testimony of witness would seem to be somewhat improbable. Witness testified, over objection (R., 82), that the people said that that tree was "the boundary line that had been established by Father Ortiz, and from that place there was the grant of Jose Maria Garcia," i. e., to the south. Witness also testified that when he first knew

the property (in 1852) Jose Maria Garcia used and controlled it and was recognized as the owner. On cross-examination witness testified as follows as to the connection between Jose Maria Garcia and the Refugio grant (R., 85):

Q. This Rincon de Cobreñas, where is that, with respect to the Refugio grant?

A. To the south.

Q. Do you know whether the Refugio grant was surveyed or not?

A. Yes, sir.

Q. This Ancon de Cobreña, is it or not within the Refugio grant as surveyed?

A. A part of it is taken in by the survey.

Q. This alamo that you spoke of, where is that with respect to the Refugio grant? Is it within or without the Refugio grant?

A. This line, right here at this alamo, was the one made originally by Father Ortiz.

Q. That is the line of the Refugio grant?

A. Yes, sir.

Q. Jose Maria Garcia had land in the Refugio grant, did he not?

A. Yes, sir.

Q. Right there at the south end of it?

A. Yes, sir.

Q. And that was the line that Father Ortiz mentioned as the boundary of his land?

A. Yes, sir; Don Jose Maria Garcia used to say that that was the boundary of his land.

Q. That boundary was the boundary of the land that he had under the Refugio grant?

A. Yes, sir.

The effect of this testimony is to show what indeed is evident from the Refugio papers themselves, that the reference therein to the lands of Jose Maria Garcia is to the lands held by him as a part of the Refugio grant. In other words, that the boundary fixed by Father Ortiz, who executed the Refugio grant, was, to use the words of witness, "the boundary of the land that he (Garcia) had *under the Refugio grant.*"

Eugene Van Patten testified on behalf of claimants (R., 89–98) that he had known the tract in question well since 1859, its owner being Jose Maria Garcia; that Garcia did not live on the tract, but at Amoles, 6 or 7 miles north of it; that witness, under an arrangement with Garcia for a part of the land, lived on it with his family for nearly a year, in 1865–66 (R., 89). Witness testified to knowing where the northwest and northeast corners of the grant are, this being upon what the old people at Amoles said as to them and recognized as the boundaries. Witness also knew of the location of the tree near Piedras Paradas on the south boundary (R., 91), and also the southwestern corner of the grant (R., 92), the latter having been pointed out to him by Garcia. Witness also stated that in 1865 a few others pastured stock there, but by permission of the Garcias, and similar permission was secured by the people down in El Paso to take out rafters and wood and such things, and that everybody respected it as Garcia's grant (R., 93). On cross-examination witness admitted (R., 94) that he was employed as agent for the owners in getting up testimony and bringing witnesses to testify, and had had an interest in the grant (R., 94)

He further admitted that, notwithstanding his assertion that everybody recognized Garcia's title, when he was in charge of the grant he (witness) had to run a good many off who tried to go in to pasture and get water there.

This closed the testimony on the subject of possession and upon it, it is respectfully submitted, no case has been made out justifying the presumption of a grant. The most positive witnesses are perhaps the three last, and their testimony is as to possession since the treaty, and this, no matter how "exclusive and notorious," is not to be regarded as an element going to make up a title. (*Hays* v. *United States*, 175 U. S., 259, and cases cited.) The testimony of the other witnesses is all to the effect that the possession was not of the exclusive character which under the holding in *Whitney* v. *United States* is necessary to a title by prescription. If, therefore, possession ran against the Spanish or Mexican Government, the case made by plaintiffs does not call for the application of the rule.

It is respectfully submitted, however, that possession, however long continued, did not ripen into title as against either the Spanish or Mexican Government, and can not constitute the basis of a confirmation against the United States, the successor in sovereignty.

The principle of nullum tempus is one universal to all nations, and is firmly engrafted upon our own system of government.

Lindsey v. *Miller*, 6 Pet., 672;
Weber v. *Harbor Commissioners*, 18 Wall., 70;

Sparks v. *Pierce*, 115 U. S., 408;
Gibson v. *Chouteau*, 13 Wall., 99;
Redfield v. *Parks*, 132 U. S., 239.

The reason of the principle is very clearly stated in the case of *Lindsey* v. *Miller* (9 Pet., 672), where it is said:

> It is a well-settled principle that the statute of limitations does not run against the State. If a contrary rule was sanctioned it would only be necessary for intruders upon the public lands to maintain their possessions until the statute of limitations shall run and then they would become invested with the title against the Government and all persons claiming under it. In this way the public domain would soon be appropriated by adventurers. Indeed, it would be entirely impracticable by the use of any power within the reach of the Government to prevent this result. It is only necessary, therefore, to state the case in order to show the wisdom and propriety of the rule that the statute never operates against the Government.

If this principle is so closely guarded under our system of government, where the instrumentalities of government and the facilities for travel are so efficient to discover and to prevent any appropriation of public land to private use, how much more is its existence to be presumed in the case of a monarchy, with all its royal prerogatives and its sovereign attributes. This is especially true when it is reflected that the sovereign in this instance (assuming the grant to have been made in 1790 as alleged) was across the seas and his domain included vast and inaccessible territory, whose adverse

occupancy by adventurers would not in all probability be brought either to his royal notice or even to the notice of his agents in the ultramarine provinces. Certainly the reason of the principle as applicable to the Spanish provinces is so apparent as to make an assertion of its nonexistence a matter of skepticism, or at least of the most careful scrutiny.

This subject is one which has engaged the attention of the courts of this country a number of times, and it is believed that any lack of harmony in the decisions as to the prescriptibility of public lands finds at least a partial explanation in the fact that most of these cases involve controversies as to the right of possession between individuals, and in which deeds or grants have been presumed in aid of a long possession. The difference in principle between this class of cases and that in which the sovereign contends with subject, asserting his title paramount to the soil, is quite obvious.

Perhaps the most recent and thorough work on this subject is that entitled "Legislation and Jurisprudence on Public Lands," by Wistano Luis Orozco, esq., of the Guadalajara, Mexico, bar, published in 1895. This publication has been quoted from by this court in several recent cases, notably in the *Santa Fe case* (165 U. S., 710), and quotations therefrom have been made in a number of briefs filed in this court in cases appealed from the Court of Private Land Claims, among them the case of *Ely's Administrator* v. *United States*, reported in 171 U. S., 220.

In the supplemental brief for the Government in that case appear the following extracts from Mr. Orozco's work, which are reproduced as quite pertinent here:

> The Crown of Spain, and afterwards the Mexican Government, always claimed and disposed of these overplus lands.
>
> The first Spanish law we find on overplus lands is Law XIV, Title XII, Book IV, of the Compilation of the Indies, of Philip II, of November 20, 1578, March 8, 1589, and November 1, 1591, as follows:
>
> Inasmuch as we have fully succeeded to the seigniory of the Indies, and inasmuch as the vacant lands, soils, and grounds that have not been granted by the kings, our predecessors, or by us, or in our name, belong to our royal patrimony and crown, it is necessary that all the land that is held without just and true titles be restored to us, according and as it belongs to us, so that, reserving, before all things, what should appear to us or to the viceroys, audiencias, and governors to be necessary for parks, town common, municipal domains, pastures, and vacant lands for the places and councils that are populated, as well as with regard to what concerns the future and the increase they may have, and allotting to the Indians what they may have need for farming and for making their plantations and for stock raising, confirming them in what they now have and giving them again what is necessary, all other land may remain and be free and unburdened to grant and dispose thereof at our will. For all of which we order and command the viceroys and presidents

of the pretorian audiencias to set, when it shall appear to them convenient, a proper term for the possessors to exhibit before them and the ministers of their audiencias, whom they shall appoint, the title of lands, stock farms, Indian farms, and *caballerias*, and, after protecting those who hold under good titles and instruments or just prescription, the rest be returned and restored to us to dispose thereof at our will.

Mr. Orozco, after quoting this law, Vol. II, page 1007, says:

"And Law XVII of the same book and title expressly declares that the public lands are a part of the royal exchequer. The same declaration is found in Chapter XIII of the Royal Instructions of October 15, 1754."

"Relying on the test transcribed, we can set down the principle:

"*The public lands in the Republic of Mexico are imprescriptible.*"

In his Volume II, Title III, pages 993, et seq., entitled "Prescription," the learned author very thoroughly discusses the general propositions of prescription, including a full consideration of the two legal phrases very often argued against the views here urged. One of those phrases, the term "a just prescription," is found in the last part of Law XIV, Title XII, Book IV, of the Compilation of the Indies, and the other, referring to "a just title by prescription," is found in chapter 4 of the Royal Instructions of October 15, 1875.

Mr. Orozco, upon a full discussion of these expressions, demonstrates (article 2) that they have no application to a case such as is presented by this record,

and that even if these had force they were repealed by the provisions of Law IX, Title VIII, of Book II, of the Novisima Recopilacion, which provides that the royal lands and other property (*bienes*) belonging to the Royal treasury are absolutely imprescriptible, and orders that the prescription can not be acquired even by time immemorial, which by the same law shall be considered interrupted and annulled. The Novisima Recopilacion having been approved and ordered observed as the law of the Spanish dominion by King Charles IV in a cedula dated July 15, 1805 (Orozco, vol. 2, title 3, article 2), this was a declaration which interrupted the running of prescription from that date, even if it ran before against the Crown. (*Weber* v. *Harbor Commissioners*, 18 Wall., 57, 71.)

See also on the proposition that time did not run against the sovereign in Mexico: Hall's Mexican Law, sections 56, 612, 639; *Ely's Administrator* v. *United States*, 171 U. S., 233; *Crespin* v. *United States*, 168 U. S., 208, 218.

But whether prescription did or did not run against the Crown, it is confidently submitted that a title resting solely on prescription is not such a claim as the Court of Private Land Claims had jurisdiction to confirm.

An even casual examination of the act of 1891 will show that its provisions do not confide to the Court of Private Land Claims the duty of confirming claims resting upon mere possession. Thus the provision of section 6 that "any person * * * claiming lands

within the limits of the territory derived by the United States from the Republic of Mexico * * * by virtue of any such Spanish or Mexican grant, concession, warrant, or survey as the United States are bound to recognize and confirm," may present his claim, is utterly inconsistent with the theory that anything but a written muniment of title can constitute the foundation of a suit in the Court of Private Land Claims.

In *Lafayette et al.* v. *Blanc* (3 La. Ann., 59) the language construed was identically the same contained in this act, being "the title to lands claimed by virtue of incomplete French or Spanish 'grants, concessions, warrants, or orders of survey,'" and this was held by the court not to confirm any claim unsupported by written evidence of title emanating from the French or Spanish governments. (See also *State* v. *Cardinas*, 47 Tex., 250).

The act of 1891 is, in its description of the class of titles which it covers, very similar to the act of May 26, 1824 (4 Stat. L., 52), the wording of the latter being "by virtue of any French or Spanish grant, concession, warrant, or order of survey legally made, granted, or issued by the proper authorities." In cases arising under the act, as reenacted by the law of July 17, 1844 (5 Stat. L., 676), it was held that there was "no power to act upon evidence of mere naked possession, unaccompanied by written evidence, conferring or professing to confer, a title of some description."

United States v. *Powers' Heirs*, 11 How., 569.
United States v. *Rillieux' Heirs*, 14 How., 188.

The further provisions of the act of 1891 are still more conclusive of the proposition that the court can not proceed upon *mere* naked possession. Thus section 6 further requires the petition to state the *date* and form of the grant, possession, warrant, or order of survey.

The act of 1824, above referred to, contained a like provision, and its purpose is discussed in *Moore's case* (12 How., 216), where it is said that this is required "in order that it may be seen whether the officer making the concession or sale had the power to do so at the time it was done." But if grants may be confirmed on allegations and proof of mere possession, this provision of the statute becomes nugatory and senseless, as does the further provision of section 6, which requires that the petition state "by whom" the grant is made.

Further, under section 8, the section under which this claim is filed, permission to invoke the jurisdiction of the court is extended only to those holdings under a *title* derived from the Spanish or Mexican Government. This *title* must be one "lawfully and regularly derived" from one of the governments just mentioned (subsection 1 of section 13); and not only that, but it must be made to "appear" that it is so derived. (*Hayes* v. *United States*, 170 U. S., 637.) It must further be made to "appear" that every condition and requirement, either antecedent or subsequent, contained in the original grant has been performed in the time and manner stated in such grant. All these provisions

of the act of 1891 show that it was not intended to include claims resting upon mere possession; and the provisions of the statute are equally exclusive of grants resting upon naked possession, whether such possession shall have extended back a half dozen years or a century before the treaty.

If there were any doubt upon this proposition, it is, however, dispelled by the fact that Congress in the act of 1891 has not only withheld from the Court of Private Land Claims the power to recognize anything short of a paper title, but has actually confided to another department of the Government the power, under certain restrictions, to recognize and provide for possessory claims. Thus, under section 16 of the act as amended by the act of February 23, 1893 (27 Stat., 47), provision is made for the protection of anyone who has, "through himself, his ancestors, grantors, or their legal successors in title or possession, been in the continuous, adverse, actual, bona fide possession" of the land for twenty years next preceding the time of survey of the township wherein situate. Under this section, upon making proper proof, such possessor of land may receive a patent therefor to an extent not to exceed 160 acres. A similar provision is made in section 17 of the act, as amended by the act of February 23, 1893, above referred to, for persons claiming title in townships already surveyed who had been in "actual, continuous, adverse possession" of lands for twenty years next preceding such survey.

These two sections measure the degree of recognition which Congress is thus far willing to accord to claims resting upon mere possession, although such possession may have been sustained for years under the former Government. To secure more liberal recognition, parties must either present to the Court of Private Land Claims "a grant, concession, warrant, or order of survey" lawfully and regularly derived from the Government of Spain or Mexico, with which they can connect themselves, or, if unable to do this, they must appeal to the legislative department of the Government.

In urging these considerations, counsel for the Government have not overlooked the case of *United States* v. *Chavez* (175 U. S., 509), cited by the court below. In that case, however, there was in the archives a formal grant, covering the southern portion of the claim presented; also in the archives deeds referring to the northern portion of the claim as a "grant." There was an approval by the governor of New Mexico, in 1785, of proceedings partitioning the land in controversy among the persons under whom the claimant deraigned title; and, finally, there was an admission by the Government that one of the claimants had had open and notorious possession and use of portions of the lands as far back as the memory of the oldest member of the pueblo of Isleta could extend. Upon that state of record this court indulged the presumption of intermediate deeds from the grantee in the document of 1716 to the claimants of 1785 and con-

firmed the claim. That is not this case, however. Here there is no title paper presented of any kind; there is not the slightest archive evidence to support the claim; there is no attempt to prove any recognition by the executive authorities at any time, and there is totally lacking the proof of exclusive possession which was admitted or proved without contradiction in the Chavez case. The divergence between the two cases is so apparent as to render unnecessary a more critical discussion of the differences.

III.

There is no proof that this grant was duly recorded in the archives of Mexico, as required by article 6 of the Gadsden treaty.

The article of the treaty just referred to is as follows (10 Stat., 1031, 1035):

> No grants of land within the territory ceded by the first article of this treaty bearing date subsequent to the day—25th of September—when the minister and subscriber to this treaty on the part of the United States proposed to the Government of Mexico to terminate the question of boundary will be considered valid or be recognized by the United States, or will any grants made previously be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico.

Was this grant duly recorded as required by the treaty?

It seems unnecessary, as showing what is meant by a "record," to do more than to cite the court to the

long line of California cases, beginning with *Fuentes* v. *The United States* (22 How., 443) and running down to *Peralta's case* (3 Wall., 434). In *Luco's case* (23 How., 515) it was held that no grant should be received as genuine by the courts of the United States "unless it be found noted in the archives or the *expediente*, or some part of it found on file among the archives where other genuine grants of the same year are found." In *Bolton's case* (23 How., 347) it was held that the record referred to in the regulations of 1828 is "the *evidence* of the grant," and that while the *titulo* given by the governor "serves among individuals the purpose of evidence," the Government, when it instituted inquiries into the subject, is "entitled to require the production of that official record which it has prescribed to its officer for its own security and as a necessary condition of a legal administration and as a necessary precaution against fraud." So *Vallejo's case* (1 Black, 541), quoting *United States* v. *Sutter* (21 How., 175), says that "in every well-regulated Government the deeds of its officers conveying parts of the public domain are registered or enrolled to furnish permanent evidence to its grantees of the origin of their title." So in the *Peralta case* (3 Wall., 434) it was said:

> But the important fact to be noticed is that a record was required to be kept of whatever was done. This record was a guard against fraud and imposition, and enabled the Government to ascertain with accuracy what portion of the public lands had been alienated. The record *was the grant*, and without it the title was not

> divested. The governor was required to give a document to the party interested, which was evidence of title, and enabled him to get possession, but his "*titulo*" did not divest the title unless record was made in conformity with law.

In the case of the *United States* v. *Castro* (24 How., 349) it said:

> It is sufficient to say that it [the grant] was required to be in writing, the officer and tribunals before which it was to pass designated, and every step in the process from the petition of the party to the final consummation of the title was not only required to be in writing, but also to be *deposited* and *recorded* in the proper public office among the public archives of the Republic.

The necessity for both *deposit* and *record* in the public archives is reiterated in *Berreyesa* v. *United States* (154 U. S., 628), cited with approval in *Whitney* v. *United States* (181 U. S., 110).

The case of *United States* v. *Vallejo* (1 Black, 555) discusses the necessity for both retaining the original in the archives and making a record of the grant, the first being done in all civil-law countries, so that parties may secure certified copies thereof, and the other to afford the Government protection against its officers and notice of their actions.

In *Peralta's case* (3 Wall., 434), above cited, which is the leading one on the subject, reference is made to the presence of the expediente in the archives as a part of the record evidence necessary to support the claim.

To the same effect, and bearing on both the necessity for and method of "record," are the *Teschmaker Case* (22 How., 405), the *Pico Case* (22 How., 406), the *Castro Case* (24 How., 346), case of *Knight's administrator* (1 Black, 228), *Neleigh's Case* (1 Black, 298), *Romero's Case* (1 Wall., 742), *White's Case* (1 Wall., 660), the *Berreyesa Case* (23 Lawyer's Coop. ed., 912), and the more recent cases of *Ortiz* (176 U. S., 422), *Elder* (177 U. S., 104, 118), and *Whitney* (181 U. S., 109).

Perhaps the latest expression from this court on this point is found in *United States* v. *Elder* (177 U. S., 118), where this court, speaking through Mr. Justice White, says:

> The constituents of the preliminary papers leading up to a grant, and the grant itself, and the distinction between them, to which attention had been so often directed by this court, was pointedly reiterated in the statement of the case made by Mr. Chief Justice Fuller in *Ainsa* v. *United States* (161 U. S., 208, 219), as follows:
>
> "An expediente is a complete statement of every step taken in the proceedings, and a testimonio is the first copy of the expediente. A grant or final title papers is attached to the testimonio and delivered to the grantee as evidence of title, an entry is made at the time in a book called the Toma de Razon, which identifies the grantee, date of the grant, and property granted."
>
> It is manifest from the foregoing review of the decisions under the California act that it was held that, in order to vest an applicant under the regulations of 1828 with title in fee,

> either absolute and perfect, or conditional and imperfect, to public land, substantial compliance with the preliminary requisites to a grant was essential; it was necessary that a grant should be evidenced by an act of the governor, clearly and unequivocally conveying the land intended to be granted, and a public record in some form was required to be made of such grant.

If the necessity for record evidence of a grant was so strongly emphasized and so consistently insisted upon in the California cases, which were considered under the treaty of Guadalupe Hidalgo, the necessity for such record under the Gadsden treaty is infinitely stronger, since the latter requires proof that the grant was "duly recorded," and the treaty of Guadalupe Hidalgo does not. The insertion of this provision in the Gadsden treaty was for a definite purpose, and that was that the United States might know what it was getting, and might not run the risk of being confronted with claims of which the Mexican archives did not give it full notice. To constitute such notice—*i. e.*, a record—two things must concur: *First*, the expediente must be in the archives; and, *second*, an entry of the issuance of the title must be made in the book of Toma de Razon. Such records must be sought in the appropriate "seat of government" for the province, intendency, State, or Territory, in which the grant was located. (*Vallejo's case*, 1 Black, 541.)

Since the proofs leave it entirely conjectural as to when this grant was made, it can not be certainly

stated where such record would probably be found if made. Assuming the grant to have been made about he year 1790, the *locus* of the grant was either in the province of New Mexico or New Biscay. If it was within the jurisdiction of New Mexico, the records are to be sought at Santa Fe; if in New Biscay, and the grant was an intendant grant, the records are to be sought at Durango; if by the commandant-general, then such records are to be sought at Arizpe or Chihuahua (dependent on the exact date), and the approvals thereof at the City of Mexico. (Hall's Mexican Law, chap. 10.) But whether these records exist at Santa Fe, Arizpe, Durango, Chihuahua, or the City of Mexico, or whether they do not exist at all, the fact remains that there was no proof of their existence presented on the trial, or of any search for them, and the case is thus confronted by the plain barrier contained in article 6 of the treaty. To confirm this grant is to hold that the treaty provisions mean nothing, and that the conditions imposed by article 6 are mere empty words.

Some testimony was produced, however, by claimants as to the loss of certain public archives at El Paso during 1846 (testimony of Bean, R., 70–73), and there are similar references in the testimony set forth in the proceedings of 1853 (R., 12–14), and it is assumed that this was intended to meet the treaty requirement. Bean testified that certain papers were destroyed at Paso del Norte in 1846, from the house of Jose Maria Garcia, which he "understood" to be "public records," and which had the "appearance" of being archives.

(R., 72.) It is evident that the witness had no personal knowledge on the subject, and the fact that the papers to which he refers were in a private dwelling indicates that they were not of the character he describes; but even if they were public records, *non constat* but that they were the records of any one of a score of public officers having nothing to do with the custody of public land titles. It is quite certain that this destruction could not have included the original archive *expediente* and *toma de razon* of this grant, however, for the simple reason that that record did not belong in Paso del Norte. That town was never at any time the seat of government for any Spanish officer invested with the power to alienate lands, and such records were not to be found there. As above shown, they belonged in Santa Fe, Durango, or one of the other places where the granting power had its official residence. But assuming that the documents which Bean saw destroyed were public documents, and that they were the *expedientes* of old land grants, that assumption still falls far short of establishing that *this grant* was "duly recorded." General proof of destruction of papers is one thing, and proof that a given grant had been duly recorded and the record thereof destroyed is something very different. The authorities on this point, if indeed they are needed, are abundant.

Thus, in *Knight's case* (1 Black, 228), it is said:

> Evidence was also introduced by the claimant tending to show that a book of records appertaining to land titles in California for the

> year 1846 was lost, but *no attempt was made to show that the grant in question was ever recorded in that book.* * * * Proof of such a loss can not avail a party in a case like the present, unless it also be shown, at least by circumstances which will justify the court in finding the fact, *that the grant was duly and properly entered in the lost record.*

So, also, in *Peralta's case* (3 Wall., 440) it was said:

> Written documentary evidence, no matter how formal and complete, or how well supported by the testimony of witnesses, will not suffice if it is obtained from private hands, and there is nothing in the public records of the country to show that such evidence ever existed. * * * But it may be said that the archives of the country may be lost or destroyed, and if so, that the party in interest should not suffer. That is true; and if the claimant can show to the satisfaction of the court that *the grant was made in conformity to law and recorded, and that the record of it has been lost or destroyed,* he will then be permitted to introduce secondary evidence of it. But the absence of record evidence is necessarily fatal, unless that absence can be accounted for.

The case just cited is especially in point, because there the court was urged to relax the rule requiring record evidence, because the case was alleged to be otherwise exceptionally meritorious; and this the court declined to do.

It was said by the court below, however, that the record of the grant should be presumed from the

possession proved—in other words, that the prohibition of the treaty might be obviated by simple proof of long-continued possession. It is believed that this is carrying the law of presumption much too far. The sixth article of the treaty was evidently a prohibition against recognizing grants that would otherwise have been valid. This was evident from the fact that there was no necessity for stipulating against the recognition of invalid grants; they would fail from their internal deficiences, under general international law. The sixth article evidently meant that were a grant perfect in form and above criticism as to the power of the granting officer, to be presented thereafter to the United States for recognition, that power should be under no obligation to respect it in any one of three instances: First, if it bore date subsequent to September 25, 1853; second, if the grant was not located; third, if it was not duly recorded. The prohibition went, not to the validity of the grant, but to considerations entirely outside of that question. Assuming that a perfect grant might be presumed from long-continued possession, the law of presumptions ceases to apply when that conclusion is reached. Long-continued possession might invest the possessor with all the rights of a perfect title, but it could not do more; it could not raise the presumption of the record of that title, any more than the possession of a perfect paper title raises the presumption of the latter's record. This is very clearly pointed out by Mr. Justice Murray in his dissenting opinion (R., 141–142), and it is there very

pertinently said that to hold that a presumed grant puts the grantee on higher ground than the holder of a perfect paper title is to say that it would have been "far better for the holders of perfect paper titles in the territory ceded to the United States by the treaty of 1853, which had not been recorded in the archives of Mexico, to have destroyed their paper titles, and relied on their long-continued possession and proof of loss of grants."

It is respectfully submitted, therefore, that upon all the grounds herein urged, the claim should be rejected and the petition dismissed.

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